LIBRARY
SUPREME COURT, U. S.
FILED
AUG 31 1974
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-52

JAMES D. LEE, ET AL.,
Petitioners,

vs.

THE CITY OF
CHATTANOOGA, TENNESSEE, ET AL.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

EUGENE N. COLLINS
City Attorney

GARY D. LANDER
Special Counsel

RANDALL L. NELSON
Special Counsel

400 Pioneer Bank Building
Chattanooga, Tennessee 37402

COURT INDEX PRESS, INC. — 809 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

		Page
I.	THE JURISDICTIONAL STATEMENT IS DEFICIENT	1
II.	THE WRIT SHOULD BE DENIED FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION	3
III.	THE QUESTIONS ARE NOT TIMELY RAISED	10
IV.	THE PETITION IS NOT TIMELY	12
V.	CONCLUSION	14

APPENDIX

I.	Amended Complaint	15
II.	Petition for Writs of Certiorari and Supersedeas Filed by Appellants, James D. Lee, et al.	27
III.	The Petition of James D. Lee, et al. for a Rehearing	39
IV.	Second Petition of James D. Lee, et al. for a Rehearing of Denial of Petition for Certiorari	41

TABLE OF CITATIONS

Cases:	Page
American Surety Company v. *Baldwin*, 287 U.S. 156, 77 L. Ed. 231, 53 S. Ct. 98 (1932)	10
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U.S. 673, 74 L. Ed. 1107, 50 S. Ct. 451 (1930)	4
Citizens National Bank v. *Durr*, 257 U.S. 99, 66 L. Ed. 149, 42 S. Ct. 15 (1921)	12
Consolidated Turnpike Co. v. *Norfolk & Ocean View Ry. Co.*, 228 U.S. 326, 57 L. Ed. 857, 33 S. Ct. 510 (1913)	11
Deane Hill Country Club, Inc. v. *City of Knoxville*, 379 F. 2d 321 (6th Cir.), *cert. denied* 389 U.S. 975 (1967)	7
Detroit Edison Co. v. *East China Township School District*, 247 F. Supp. 296 (E. D. Mich. 1965), *aff'd* 378 F. 2d 225 (6th Cir. 1967), *cert. denied* 389 U.S. 932 (1967)	5, 7
Fleming v. *Fleming*, 264 U.S. 29, 68 L. Ed. 547, 44 S. Ct. 246 (1924)	12
Flournoy v. *Wiener*, 321 U.S. 253, 88 L. Ed. 708, 64 S. Ct. 548 (1944)	11
Godchaux Co. v. *Estopinal*, 251 U.S. 179, 64 L. Ed. 213, 40 S. Ct. 116 (1919)	10, 12
Gold v. *Lomenzo*, 304 F. Supp. 3 (S. D. N. Y. [1969]), *rev'd on other grounds* 425 F. 2d 959 (2d Cir. 1970)	7-8
Gomillion v. *Lightfoot*, 364 U.S. 339, 5 L. Ed. 2d 110, 81 S. Ct. 125 (1960)	6

Page

Gypsy Oil Co. v. *Escoe*, 274 U.S. 498, 48 S. Ct. 112 (1927) 13

Hammonds v. *City of Corpus Christi*, 343 F. 2d 162 (5th Cir.), *cert. denied* 382 U.S. 837, 86 S. Ct. 85, 15 L. Ed. 2d 80 (1965) 6

Herndon v. *Georgia*, 295 U.S. 441, 79 L. Ed. 1530, 55 S. Ct. 794 (1935) 10

Hunter v. *City of Pittsburgh*, 207 U.S. 161, 52 L. Ed. 151, 28 S. Ct. 40 (1907) 4, 5, 6, 7, 9

International Harvester Co. v. *Kansas City*, 308 F. 2d 35 (10th Cir. 1962), *cert. denied* 371 U.S. 948, 83 S. Ct. 503, 9 L. Ed. 2d 498 (1963) 6, 9

Lee v. *City of Chattanooga*, 500 S.W.2d 917 (Ct. Apps. 1973) 2

Michigan-Wisconsin Pipeline Co. v. *Calvert*, 347 U.S. 157, 98 L. Ed. 583, 74 S. Ct. 396 (1954) 12

Minneapolis, St. Paul, & Saulte St. Marie Ry. Co. v. *Washburn Lignite Coal Co.*, 254 U.S. 307, 65 L. Ed. 310, 41 S. Ct. 140 (1920) 4

Morse v. *United States*, 270 U.S. 151, 153, 154, 46 S. Ct. 241, 70 L. Ed. 518 13

Patterson v. *Colorado*, 205 U.S. 454, 51 L. Ed. 879, 27 S. Ct. 556 (1907) 4

State ex rel. Balsinger v. *Madisonville*, 222 Tenn. 272, 435 S.W.2d 803 (1968) 9

Taylor v. *Beckham*, 178 U.S. 548, 44 L. Ed. 1187, 20 S. Ct. 1009 (1913) 8

Wallace v. *City of Altus, Oklahoma*, 465 F. 2d 420 (10th Cir. 1972) 9

Williams v. *Nashville*, 89 Tenn. 487, 15 S.W. 364 (1891) 8

Legislative Authority: Page

Constitution of the State of Tennessee,
Article I, Section 8 ..... 2, 11

Rules of the United States Supreme Court,
Rule 23 (f) 1, 2, 10

Rules of the United States Supreme Court,
Rule 34 (2) 13

Tennessee Code Annotated,
§ 6-303, et seq. 7, 11

Tennessee Code Annotated,
§ 6-309 3

Tennessee Code Annotated,
§ 6-310 8

Tennessee Rules of Civil Procedure,
Rule 15 2

28 United States Code,
§ 1257 (3) 3

28 United States Code,
§ 2101 (c) 13

United States Constitution,
Article I, Section 1 ..... 2, 7, 9

United States Constitution,
Article IV, Section 4 8

United States Constitution,
Fourteenth Amendment 2, 3, 4, 7, 9

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-52

JAMES D. LEE, ET AL.,

Petitioners.

vs.

THE CITY OF
CHATTANOOGA, TENNESSEE, ET AL.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

I

THE JURISDICTIONAL STATEMENT IS DEFICIENT

Respondents would show that both the Jurisdictional Statement and the Statement of the Case in the Petition are deficient, inaccurate, and not in compliance with Rule 23 (f) of this Court. Specifically, the Statement of the Case at pages 12-19 of the Petition does not "specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them . . .; and the way in which they were passed upon by the court; . . . ." In fact, the Amended Complaint, properly filed in the court of first

instance under Rule 15, Tennessee Rules of Civil Procedure, made only one federal constitutional averment:

> "8. B. That the code section under which the areas were allegedly annexed (TCA 6-309) is unconstitutional in that it authorized the imposition upon citizens of this state and nation of a government against their will or wishes and violates the 14th Amendment of the United States Constitution and Article I, Section 8 of the Constitution of the State of Tennessee." Respondents' Appendix, page 18.

Petitioners, as appellees in the Tennessee Court of Appeals, raised no Fourteenth Amendment issues and no issue, now presented, under Article I, Section 1 of the United States Constitution. The Petition thus fails to show that "the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." Rule 23 (f).

Respondents note that the decision below is reported as *Lee* v. *City of Chattanooga*, 500 S.W.2d 917 (Ct. App. 1973). Respondents also add to the Statement of the Case the precise holding of the Court of Appeals on the question of abandonment of annexation and "judicial legislation" as follows:

> ". . . we are of the opinion that once the annexation ordinances were validly passed, as concededly they were, and there was never any adjudication by the courts that they were not validly passed the annexed territories became a part of the City of Chattanooga and could not be severed from it by any resolution passed by the governing body of the City." 500 S.W. 2d at 919.

Thus, the annexations were held to have been *de jure* lawful.

II

THE WRIT SHOULD BE DENIED FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION

The petitioner challenges the procedures whereby certain areas of Hamilton County were annexed to Chattanooga pursuant to T. C. A. § 6-309[1] and the settlement of resultant *quo warranto* actions upholding the annexations in consent judgments. The Petition here asserts violations of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution; the settlements are also attacked as being "judicial legislation" in violation of the concept of separation of powers vouchsafed in the federal constitution and the Constitution of Tennessee.[2] Lastly, as point 3, at page 11 of the Petition, petitioners raise questions purely of state law concerning the statutory annexation procedures.

Petitioners cite 28 U. S. C. § 1257 (3) as the basis for jurisdiction in this case, apparently asserting that a "right, title, privilege or immunity is specially set up or claimed under the Constitution of . . . the United States." There is no challenge here to a state statute as being repugnant to the United States Constitution or, indeed, any other statutory basis for review contained in 28 U. S. C. § 1257 (3).

Given this asserted basis for jurisdiction, it is clear that reliance on alleged violations of the Constitution of Tennessee or challenges to the decision below as erroneous under state law raise no federal question and confer no

---

[1] Petitioners apparently abandoned below and here their initial sole constitutional averment that T. C. A. § 6-309, et seq., is unconstitutional.

[2] Respondents note elsewhere in this Brief that these issues are not timely raised. This part of the Brief deals with their substance.

jurisdiction on this Court. *E. g., Patterson* v. *Colorado,* 205 U. S. 454, 51 L. Ed. 879, 27 S. Ct. 556 (1907); *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673, 74 L. Ed. 1107, 50 S. Ct. 451 (1930). As noted, *supra,* the Tennessee Court of Appeals held that the annexation ordinances were properly enacted pursuant to unchallenged statutory authority and could not be abandoned by any disputed resolution of the City's governing body. This holding is an adequate, nonfederal resolution of the litigation and should preclude review. *E. g., Minneapolis, St. Paul, & Saulte St. Marie Ry. Co.* v. *Washburn Lignite Coal Co.,* 254 U.S. 370, 65 L. Ed. 310, 41 S. Ct. 140 (1920). For these reasons, any question of Tennessee statutory or constitutional law is not properly before this Court.

Turning to the substantive constitutional issues, respondents would show that this Court has held that annexation procedures under state law are purely political matters not reviewable by this Court on Fourteenth Amendment grounds.

The leading decision is *Hunter* v. *City of Pittsburgh,* 207 U. S. 161, 52 L. Ed. 151, 28 S. Ct. 40 (1907), wherein it was stated:

> " 'Municipal corporations are political subdivisions of the State, created as covenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. * * * The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the

> State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation, such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers * * *.'"

This case involved a challenge to a state's annexation statutes which allowed consolidation of a city into a larger municipality over the disapproval of a majority of its residents.

Hunter was recently applied as controlling law in several federal cases raising due process and equal protection challenges to annexations. In *Detroit Edison Co.* v. *East China Township School District*, 247 F. Supp. 296 (E. D. Mich. 1965), *aff'd* 378 F. 2d 225 (6th Cir. 1967), *cert. denied* 389 U. S. 932 (1967), property owners sued for a declaration that annexation of school districts to a district where their property was located was a violation of the federal constitution. Citing *Hunter, supra,* the district court held:

> "Any alteration of municipal boundaries is a matter within the complete discretion of the state and not

> confined by any rights secured by the federal constitution." 247 F. Supp. at 299.

The district court also considered the effect on *Hunter* of *Gomillion* v. *Lightfoot,* 364 U. S. 339, 5 L. Ed. 2d 110, 81 S. Ct. 125 (1960), and further held:

> "Gomillion does not diminish the authority of Hunter in annexation *procedure* cases." (Emphasis in the original.) 247 F. Supp. at 300.

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed in an opinion which included the following relevant discussion:

> "Two other Circuits, the Fifth and Tenth, have had occasion to pass on cases where the constitutionality of a state annexation procedure was raised. As the District Court noted, both Courts of Appeals relied on Hunter v. City of Pittsburgh in affirming dismissals of their respective cases. In Hammonds v. City of Corpus Christi, 343 F.2d 162 (5th Cir.), cert. denied, 382 U.S. 837, 86 S.Ct. 85, 15 L.Ed.2d 80 (1965), the court found no error in the District Court's decision which dismissed the complaint on the ground, among others, that *'the annexation of lands to a city has been held without exception to be purely a political matter, entirely within the power of the State Legislature to regulate'*. And in International Harvester Co. v. Kansas City, 308 F.2d 35 (10th Cir. 1962), cert. denied, 371 U.S. 948, 83 S.Ct. 503, 9 L.Ed.2d 498 (1963) after quoting from *Hunter,* stated:
>
> > 'Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions. * * *' "
>
> 378 F. 2d at 229. (Emphasis supplied.)

The United States Court of Appeals for the Sixth Circuit in the same year ruled on the very annexation statutes in question here, T. C. A. § 6-303, et seq. In *Deane Hill Country Club, Inc.* v. *City of Knoxville,* 379 F. 2d 321 (6th Cir.), *cert. denied* 389 U. S. 975 (1967), a corporation challenged the constitutionality of the Tennessee annexation statutes. The court of appeals affirmed dismissal of the complaint, holding that annexation by the city could not be challenged under the Fourteenth Amendment on the basis of the procedure employed or authorized. Relying on its decision in *Detroit Edison, supra,* as well as *Hunter, supra,* the court held:

> "It is clear, for the reasons set forth in Detroit Edison Co. v. East China Township School District, supra, that *Hunter* precludes constitutional challenge under the Fourteenth Amendment to annexations by municipal corporations of adjoining territories on the basis of the procedure employed or authorized by the state or because of the pecuniary repercussions in the form of the ordinary incidence of city taxation. It follows that the District Court properly dismissed the complaint herein."

It is thus clear that no federal question is presented by the Fourteenth Amendment contentions of the Petition.

Petitioners also rely on Article I, Section 1 of the United States Constitution, arguing that the procedure followed whereby *quo warranto* suits were dismissed by consent decrees was judicial legislation in violation of the doctrine of separation of powers.

Initially, it is noted that Article I, Section 1 of the federal constitution vests federal legislative power in the Congress of the United States and is *per se* inapplicable to the governments of the states. *See, Gold* v. *Lomenzo,*

304 F. Supp. 3 (S. D. N. Y. 1969), *rev'd on other grounds* 425 F. 2d 959 (2d Cir. 1970).

For instance, it is common knowledge that the state of Nebraska has a constitutional unicameral legislature notwithstanding the fact that the federal constitution provides for a bicameral legislature. While Article IV, Section 4, of the United States Constitution guarantees to every state in the union a "Republican Form of Government," no assertion is made here or below of any violation of this guarantee, which would not raise a justiciable issue in any event, *Taylor* v. *Beckham,* 178 U. S. 548, 44 L. Ed. 1187, 20 S. Ct. 1009 (1913). Moreover, the Tennessee statute, T. C. A. § 6-310, clearly authorized litigation of the reasonableness of annexation procedure. Lastly, the provisions of the state constitution dealing with division of powers by definition do not raise federal constitutional questions for review by this Court or writ of certiorari to the state appellate courts.

Although the question is not presented directly by the Petition, the cases cited at pages 7-9 seem to argue that annexation is a deprivation of property within the scope of due process guarantees. This issue has been long concluded by the Supreme Court of Tennessee, which held in *Williams* v. *Nashville,* 89 Tenn. 487, 15 S. W. 364 (1891):

> "The extension of corporate limits so as to include additional territory is in no sense an impairment of the owner's liberty, nor is it a taking of private property for public use. If it were held to be so, then no municipal corporation could be established or enlarged, and none of these valuable instrumentalities of the State would have a lawful existence.
>
> . . .
>
> Placing property within the corporate limits of a given town or city, where it will be subjected to the

> additional burden of municipal taxation and supervision, is not a taking of the property at all. The ownership is in no degree changed, and the increased burden is presumed to be equaled by the increased advantages."

This decision has been recently reaffirmed in *State ex rel Balsinger* v. *Madisonville,* 222 Tenn. 272, 435 S. W. 2d 803 (1968).

Finally, point three of the Petition raises questions of compliance with the state annexation statutory procedures, which are purely matters of state law raising no federal issue as noted in *Hunter* v. *City of Pittsburgh, supra,* and the other cases discussed in this section. On this very point, the tenth circuit recently denied federal jurisdiction to review an annexation in which procedural errors were alleged, saying:

> "We have held that error in the administration of state law is not a matter of federal cognizance under the Fourteenth Amendment due process clause." (Citing *International Harvester Co.* v. *Kansas City, supra*) *Wallace* v. *City of Altus, Oklahoma,* 465 F. 2d 420 (10th Cir. 1972).

It is, therefore, clear that the Petition raises no substantial federal question under the Fourteenth Amendment, Article I, Section 1, or under the Tennessee constitution.

III

THE QUESTIONS ARE NOT TIMELY RAISED

Respondents assert that the Petition is purposefully vague about the manner in which the federal questions were raised "in the court of first instance," Rule 23 (f), because, in fact, these federal constitutional issues were never raised until the second Petition to Rehear was filed after denial of certiorari by the Tennessee Supreme Court, which did not pass on the questions, as admitted by petitioners. A federal question thus presented for the first time on a petition to rehear, particularly when certiorari was never granted by the state's highest court, is too late to support certiorari by this Court. *American Surety Company* v. *Baldwin,* 287 U. S. 156, 77 L. Ed. 231, 53 S. Ct. 98 (1932); *Herndon* v. *Georgia,* 295 U. S. 441, 79 L. Ed. 1530, 55 S. Ct. 794 (1935); *Godchaux Co.* v. *Estopinal,* 251 U. S. 179, 64 L. Ed. 213, 40 S. Ct. 116 (1919).

In support of this position, respondents have included in an Appendix to this Brief the Amended Complaint filed of right under the Tennessee rules of practice, the petitioners' Petition for a Writ of Certiorari in the Supreme Court of Tennessee, and their two Petitions to Rehear.

As may be seen from these pleadings, the Complaint in the court of first instance asserted only the unconstitutionality of Tennessee annexation statutes (Complaint, § 8B, Appendix at page 18). This argument was abandoned by petitioners. The Petition for Certiorari filed in the Supreme Court of Tennessee raises no federal questions in the nine reasons cited for relief (Petition, Appendix, page 27). Only questions of state law were raised therein.

In the first Petition to Rehear filed in the Tennessee

Supreme Court, petitioners did set forth the following point:

> "V. Petitioners have been denied due process of law in that annexation occurred by judicial legislation — not by legislative process as required by Tennessee statutes, T. C. A. § 6-303, et seq." Petition to Rehear, Appendix, page 40.

There is no specific reference in this point to federal constitutional rights, however. The Tennessee Constitution, Article 1, Section 8, guarantees due process of law, and it is, therefore, unclear that petitioners were relying on a federal due process claim in the first Petition to Rehear. In such cases, this Court deems the averment to be raising state constitutional rights. *See, Flournoy* v. *Wiener*, 321 U. S. 253, 88 L. Ed. 708, 64 S. Ct. 548 (1944); *Consolidated Turnpike Co.* v. *Norfolk & Ocean View Ry. Co.*, 228 U. S. 326, 57 L. Ed. 857, 33 S. Ct. 510 (1913).

The second Petition to Rehear thus is the first pleading explicitly to raise the federal questions alleged in the instant Petition, Appendix, page 41. In this second Petition the federal due process argument was never explicitly raised, petitioners confining themselves to the "judicial legislation" issue, part of which relies on a state constitutional provision.

It thus appears from the record that the federal due process or equal protection questions sought to be reviewed have never been raised below, and that the "judicial legislation" question was explicitly raised only in the second Petition to Rehear.

Furthermore, as petitioners note in their Petition, the Tennessee Supreme Court denied without comment both Petitions to Rehear. Therefore, any federal question arguably raised in either Petition to Rehear does not affirma-

tively appear to have been considered and decided adversely to petitioners. In such cases, this Court does not accept jurisdiction. *Godchaux Co.* v. *Estopinal, supra; Citizens National Bank* v. *Durr,* 257 U. S. 99, 66 L. Ed. 149, 42 S. Ct. 15 (1921); *see, Fleming* v. *Fleming,* 264 U. S. 29, 68 L. Ed. 547, 44 S. Ct. 246 (1924).

IV

THE PETITION IS NOT TIMELY

On August 2, 1974, a Petition for Writ of Certiorari to the Supreme Court of Tennessee was filed in this Court. Inasmuch as the Tennessee Supreme Court never decided any issue in the case but thrice declined to review the decision of the Tennessee Court of Appeals, the Petition here should have been filed for a writ to that court. *Michigan-Wisconsin Pipeline Co.* v. *Calvert,* 347 U. S. 157, 98 L. Ed. 583, 74 S. Ct. 396 (1954). The first Petition for Writ to the Tennessee Supreme Court was filed within 90 days of the denial of the second Petition to Rehear by that court on May 6, 1974 (petitioners' Appendix, page 91).

On August 12, 1974, respondents' counsel received a single copy (contrary to Rule 33[1]) of another longer Petition for a Writ of Certiorari to the Tennessee Court of Appeals, clearly filed more than ninety days after the final action of the Tennessee Supreme Court.[3]

Under the *Michigan-Wisconsin Pipeline* case, the first Petition should be dismissed for having sought a writ to

[3] Petitioners also failed to supply respondents with a form indicating the docket number and the date of filing, as required by Rule 21(3); therefore, these dates are estimates.

the wrong state court. Under this case and the authority of *Gypsy Oil Co.* v. *ESCOE,* 274 U. S. 498, 48 S. Ct. 112 (1927), the instant Petition to the Court of Appeals should also be dismissed. In *Gypsy Oil Co.,* the state supreme court had granted leave to file a second petition to rehear and then denied the rehearing. A petition for a writ was filed in this Court more than ninety days after the denial of the first petition to rehear. There, as in the present case, the state court never entertained the second petition. In denying a writ, this Court stated:

> "The running of the time within which proceedings may be initiated here to bring up judgment or decree for review is suspended by the seasonable filing of a petition for rehearing. But it begins to run from the date of denial of such petition and further suspension cannot be obtained by mere presentation of a motion for leave to file a second request for rehearing. Morse v. United States, 270 U. S. 151, 153, 154, 46 S. Ct. 241, 70 L. Ed. 518."

In the present case, even if the second Petition to the Tennessee Supreme Court were deemed to have been entertained by that Court, the instant Petition for a writ to the Tennessee Court of Appeals was presumably filed on August 13, 1974, more than ninety days after the denial of the second Petition to Rehear and, therefore, is too late. 28 U. S. C. § 2101 (c).[4]

---

[4] By copy of a letter from petitioners' counsel to the Clerk, counsel is advised that the Clerk docketed the first Petition as being to the Court of Appeals of Tennessee and suggested a "reprinting." Respondents know of no authority for the filing of the second Petition on August 13, 1974, beyond the ninety day statutory jurisdictional limit of 28 U. S. C. § 2101(c). No application for an enlargement of time in which to file a correct Petition or other papers was ever filed, as required by Rule 34(2) of this Court.

V

CONCLUSION

For the foregoing reasons, both Petitions for a Writ of Certiorari should be denied.

EUGENE N. COLLINS
GARY D. LANDER
RANDALL L. NELSON

Attorneys for Respondents
400 Pioneer Bank Building
Chattanooga, Tennessee 37402

APPENDIX

I

TO ONE OF THE HONORABLE CHANCELLORS HOLDING THE CHANCERY COURT OF HAMILTON COUNTY, TENNESSEE

No. 46376
PART I

JAMES D. LEE, RALPH M. WEST, C. L. LILLARD, FRED ROSE, JOHN E. OSBORNE, PAUL W. SHERLIN, ROSS L. BUCKLEY, MICHAEL W. DAVIS, ROBERT P. ROSE, CLARENCE S. HOLLAND, HUGHIE E. REEVES, LABAN DeFRIESE, O. M. MULLING, MARTHA ANN DAWSON MADDOX, ROY L. LUMPKIN, JR., PAUL O. WIRZ, JOHN O'KEEFE, JAMES A. BOULDIN, MR. JACK PRATT, JR., CLYDE O. COOPER, JACK H. PRATT, III, HAROLD R. COCKRELL, MARCUS L. MOORE, GEORGE BUSSING, ROBERT D. KING, HERMAN HEINEMANN, J. H. PAYNE, and CLAUDE A. FINLEY,

Plaintiffs,

vs.

THE CITY OF CHATTANOOGA, a municipality within the State of Tennessee; and MAYOR ROBERT KIRK WALKER, COMMISSIONER JOHN FRANKLIN, COMMISSIONER STEVE CONRAD,

COMMISSIONER PAT ROSE, and COMMISSIONER EUGENE ROBERTS, in their capacity as the BOARD OF COMMISSIONERS OF THE CITY OF CHATTANOOGA, TENNESSEE, all of the said individuals being citizens of Hamilton County, Tennessee,

Defendants.

AMENDED COMPLAINT

Plaintiffs named in the caption above, sue the Defendants named in said caption, for the relief set forth hereinafter under the heading, Demand for Judgment, and for cause of action, allege, as follows:

I.

Statement of Claim

1. Plaintiffs are residents of Hamilton County, Tennessee, and/or owners of property located in Hamilton County, Tennessee, in areas commonly known as East Brainerd, Tyner and Lake Hills-Murray Hills, as described more fully hereinafter in the Annexation Ordinances referred to in Paragraph "5" hereof.

2. Defendant, City of Chattanooga, is a municipal corporation of the State of Tennessee, and the individual Defendants are the Mayor and four (4) Commissioners who are Members of the Board of Commissioners, the legislative body of the City of Chattanooga.

3. This action is brought by the Plaintiffs on their own behalf as well as on behalf of each and all other persons who are residents and/or property owners in the aforesaid areas. Such persons are thousands in number

and therefore are so numerous as to make it impracticable to bring them all before the Court. The claims and rights of the Plaintiffs which are the subject of this action, and the questions of law and fact arising herein are typical and common to all of the residents and/or property owners of said areas. Plaintiffs will fairly and adequately protect the interests of the said persons. Questions of law and fact which are common to the members of the class predominate over any questions affecting only individual members, and Plaintiffs aver that a class action is superior to any other available method for the fair and efficient adjudication of the matters in controvery in this case.

4. On November 12, 1968, Defendant City, acting by its Commissioners, adopted a Plan of Services for annexation of each of the three said areas in accordance with Tennessee Code Section 6-309.

5. On November 26, 1968, Defendant City, acting by its Commissioners, adopted on third and final reading, Ordinance Number 5977, covering the East Brainerd area, Ordinance Number 5978, covering the Tyner area, and Ordinance Number 5979, covering the Lake Hills-Murray Hills area. Copies of said Ordinances, marked *Exhibits 1, 2,* and *3,* respectively, are attached hereto and hereby made a part hereof by reference.

6. In Section 3 of each of said ordinances, it was provided that immediately upon the effective date of each said ordinance, Defendant City would furnish to the residents and/or property owners in the above described territories, fire and police protection and garbage and health services; that it would install any additional necessary fire hydrants, furnish any necessary additional street lighting and complete any necessary street improvements within

the said areas, all in accordance with said plan of services that had been adopted on November 12, 1968.

7. On December 20, 1968, a suit contesting annexation of the above referred to East Brainerd area was filed in the Circuit Court of Hamilton County, Tennessee, being Docket Number 11071-J. On December 23, 1968, suits are filed in the Circuit Court of Hamilton County, Tennessee, contesting annexation of the above-referred to Tyner area, being Docket Number 11078-J and the Lake Hills-Murray Hills area, being Docket Number 11077-J.

8. Each of the above referred to suits, contesting annexation of the aforementioned areas, alleged, among other things, the following:

A. The ordinances were passed by the Defendant without the consent of the residents and/or owners of the property lying within the territories annexed, and in fact, contrary to the expressed wishes of the majority of said residents and/or property owners.

B. That the code section under which the areas were allegedly annexed (T.C.A. § 6-309) is unconstitutional in that it authorized the imposition upon citizens of this state and nation of a government against their will or wishes and violates the 14th Amendment of the United States Constitution and Article 1, Section 8 of the Constitution of the State of Tennessee.

C. That public notice of the annexation, as required by T.C.A. § 6-309, was not properly adhered to by the Defendant; that public hearings purportedly held by the Defendant did not properly advise the interested citizens or property owners of the fact that annexation was occurring.

D. That the annexation was arbitrary, unreasonable and unlawful, and not necessary for the welfare of the residents and/or property owners of the affected territories and of the municipality as a whole, and therefore constituted an exercise of power not conferred by law.

E. That the prosperity of the City of Chattanooga and of the areas sought to be annexed would not be materially retarded by the failure to annex the territory, but on the contrary would be seriously retarded if the annexation of the territory is permitted.

F. That the safety and welfare of the residents and property within the territory sought to be annexed would in no manner be endangered by the failure to annex the territories, but would more likely be endangered by the annexation of the territories.

G. That the annexation of the territories was not reasonably necessary for the health, safety and welfare of the residents and/or property owners of the territories designated, or the residents and/or property owners of the City of Chattanooga.

H. That the City of Chattanooga would not be able to provide adequate and proper services in accordance with the manner of taxation that the law imposed upon the City to tax the residents or property owners of the territories allegedly annexed.

Plaintiffs adopt each of the allegations contained in Section A through H and make same a part of this complaint.

9. In 1969, answers were filed in each of the three cases on behalf of the Defendants and no further actions was taken until August 18, 1971, when a *"Final Order"* was entered in each case.

10. Plaintiffs allege that before the *"Final Order"* was filed in each of said cases, Defendant recognized that it did not have the capacity to fulfill its obligations and duties to the residents and/or property owners of the aforementioned areas under the plan of services adopted and incorporated into the annexation ordinances passed on November 26, 1968; therefore, Defendants decided to and did encourage the Legislature of the State of Tennessee to pass an amendment to T.C.A. § 6-309 to 320, the annexation statutes of the State of Tennessee, to provide the City of Chattanooga with an additional method of annexation without full taxation, whereby said City could tax residents within the newly annexed territories only for the municipal services rendered. Said amendment, being Chapter 420, Public Acts of 1971 was passed on May 25, 1971.

11. Thereafter, on August 17, 1971, Defendant, acting through its legislative body, The Board of Commissioners at a duly held meeting, voted 3 to 2 that annexation of each of the areas should be carried out in accordance with Sections 6-308 to 6-320 of the Tennessee Code, as amended by Chapter 420 of the Public Acts of 1971 providing for a new method of annexation; that they adopted a new plan of services, a new timetable for putting said new plan into effect and a new method of taxation which provided, without qualification:

> ". . . under no circumstances shall any tax be levied for any service prior to the year hereinabove specified therefor;"

that is, as specified in the new Plan of Services. Provisions covering the foregoing actions taken by the Board along with others, were incorporated into each *"Final Order"*

proposed for entry by the Circuit Court in the annexation cases pending at that time, as referred to above. The 3 members of the Board of Commissioners who voted in favor of said Resolution signed a document entitled "Authorization for Settlement of Annexation Cases" giving their authorization and consent to the office of the City Attorney to settle the three annexation cases under the terms and conditions of said *"Final Orders"* which were attached to said written authorization. A *"Final Order"* providing for the stipulated change to the new method of annexation in accordance with the new Plan of Services, new timetable and new method of taxation was entered in each of said causes on August 18, 1971, and copies thereof are attached hereto as *Exhibits 4, 5* and *6,* respectively and hereby made a part hereof. The City abandoned its 1968 Ordinances and proceeded to act in accordance with said *"Final Orders"* — no new Ordinances were enacted.

12. Plaintiffs allege that at the time the aforesaid *"Final Orders"* were entered, Defendant was aware of an opinion rendered by the office of the Attorney General of the State of Tennessee to the effect that the 1971 amendment of the Tennessee annexation statutes, that is, Chapter 420 of the Public Acts of 1971, generally known as the "Variable Tax Act" was unconstitutional. Therefore, the Plaintiffs knew that if the Attorney General were correct in his opinion and if the law were declared unconstitutional by the Supreme Court of the State of Tennessee, the City could not legally tax the residents of the three said areas with a variable tax as it had provided it would and, therefore, that its new method of annexation was meaningless — a nullity and void. Plaintiffs allege that under the circumstances, the Defendants intentionally misled the residents and property owners of each of the three areas

in question to surrender their day in court and allow the pending cases to be dismissed based upon the City's promise and agreement with the residents and property owners that it would tax in accordance with a variable tax rate based on services rendered as opposed to the general tax rate that the other areas of the City of Chattanooga are taxed under when it had been advised by the Attorney General that such was unconstitutional.

13. On December 18, 1972, the Supreme Court of the State of Tennessee, declared the statutory amendment (Chapter 420, Public Acts of 1971) unconstitutional, holding that said amendment constituted an *additional method of annexation* without full taxation and a violation of Article II, Section 9 of the Constitution of the State of Tennessee.

14. Plaintiffs aver that the three areas in question have never been legally annexed and that the issues raised in each of the three cases contesting annexation were never resolved by the Court, but rather a new method of annexation and special taxation was adopted by the illegal and *void "Final Orders"* entered in each of the three cases; that these *"Final Orders"* amounted to unconstitutional "judicial legislation" and were null and void; and likewise, the attempted annexation of the three areas is null and void ab initio.

15. In the Final Orders entered in the said cases, the Defendant agreed that under no circumstances would any tax be levied for any service prior to the year specified in the said Order. Defendant further agreed that in the event the "Variable Tax Act" amendment should be held unconstitutional, that the residents or property owners of the three areas would not be liable for any taxes that would otherwise have accured prior to any such final ad-

judication. Plaintiffs allege that tax notices for the year 1972 have been sent to each property owner in the three areas in question, in accordance with the Variable Tax Act, with the following notation being at the bottom of the tax notices: "NOTICE-PAYMENT RECEIVED SUBJECT TO CONSTITUTIONALITY OF CHAPTER 420, TENN. PUBLIC ACTS 1971". Although the Defendant agreed in the Final Orders entered in the Circuit Court cases that the property owners in the three areas would not be taxed for any amount prior to the time the Variable Tax Act was declared unconstitutional, and further agreed on the tax notices sent to the property owners that no tax would be collected for such time if the Variable Tax Act was declared unconstitutional, the City has been and still is collecting taxes in violation of its promise and under an unconstitutional act.

16. Plaintiffs allege, in the alternative, that in the event the Court finds that the areas in question have been annexed, that the City of Chattanooga cannot validly tax the property owners of said areas at the same rate as the Defendant is taxing the property owners of other areas who receive adequate services in view of the fact that Defendant has not had and does not have a valid plan of services as required by T.C.A. § 6-309; that Defendant is not and cannot properly provide adequate and proper police protection, street maintenance, garbage collection, street paving, street cleaning, street construction services, fire protection services, street lighting, parks and recreational services, and storm sewers and sanitary sewers, all as required by the law.

II

Demand for Judgment

WHEREFORE, Plaintiffs pray for the following relief:

1. That proper process issue upon the Defendants, requiring them to answer this complaint within the time and in the manner provided by law.

2. That this Honorable Court issue a show cause order requiring the Defendant to show cause why it should not be enjoined from further collecting any 1972 taxes from property owners in the areas set forth in Section III of this complaint, commonly known as the East Brainerd, Tyner and Lake Hills-Murray Hills areas, and that said temporary injunction remain in full force and effect until a date and time fixed by the Court for the hearing of this cause.

3. That the Court issue a show cause order, requiring the Defendant, City of Chattanooga, to show cause why it should not be compelled to pay into the registry of this Court all taxes collected for the year 1972, from the property owners in the areas set forth in Section III of this complaint commonly known as the East Brainerd, Tyner, and Lake Hills-Murray Hills areas, pending the final determination of this issue.

4. That upon the final hearing of this cause, such temporary injunctions be made permanent.

5. That upon the final hearing of this cause, the Court enter an order allowing each property owner in the three areas involved to be refunded the property taxes heretofore paid to the City for the year 1972.

6. That upon the final hearing of this cause, the Court

decree that the three areas referred to in Paragraph III of the complaint, commonly known as the East Brainerd, Tyner, and Lake Hills-Murray Hills areas, have not been properly annexed and that the alleged annexation by the Defendant of the three areas involved in null and void.

7. In the alternative, if the Court finds that the three areas were properly annexed in 1968, that the Court enter an order decreeing that the said areas be "de-annexed" since the Defendant has so flagrantly violated its duties and obligations to the residents and property owners of the three areas heretofore referred to.

8. In the alternative, if the Court holds that the three areas have been properly annexed, that the Court decree that each of the Circuit Court orders entered in the three areas involved in null and void and decree that the issues remaining in those three cases are still subject to judicial action and that this Court adjudicate these issues and enter an order decreeing that the alleged annexation of the three areas in question is unreasonable and not for the safety, welfare, and best interest of the citizens and property owners and decree the alleged annexation of said areas void ab initio.

9. In the alternative, in the event the Court holds that the three areas have been properly annexed, that the Court, by a Writ of Mandamus, compel the City of Chattanooga immediately to provide the proper and reasonable services that the citizens and property owners of the three areas involved are entitled to, and further that the Court compel the Defendants immediately to provide and carry out a plan of services in accordance with the manner in which the citizens and residents are presently being taxed or de-annex said areas.

10. Plaintiffs pray for general relief.

/s/ LEONARD R. TANNER, JR.
/s/ STAN GUTHRIE
Attorneys for Plaintiffs

Tanner & Jahn, Attorneys
Twelfth Floor Volunteer Building
Chattanooga, Tennessee 37402
Telephone 266-0754
April 2, 1973.

APPENDIX

II

IN THE SUPREME COURT OF TENNESSEE

HAMILTON COUNTY CHANCERY

No. ————,

JAMES D. LEE, ET AL,
Appellants,

vs.

THE CITY OF CHATTANOOGA, ET AL,
Appellees.

PETITION FOR WRITS OF CERTIORARI AND SUPERSEDEAS FILED BY APPELLANTS, JAMES D. LEE, ET AL

Submitted By:

TANNER & JAHN
1223 Volunteer Building
Chattanooga, Tennessee
Attorneys for Appellants
James D. Lee, et al

PETITION FOR WRITS OF CERTIORARI AND SUPERSEDEAS

Appellants represent to the Court that they are very much aggrieved by the opinion and judgment rendered against them by the Honorable Court of Appeals for the Eastern Section of Tennessee, sitting at Knoxville, Tennessee, said judgment being entered of record on July 26, 1973. The Court of Appeals reversed the judgment of the Chancery Court of Hamilton County, Tennessee, sustaining all of Appellees' assignments of errors and overruling Appellants' assignment of error.

STATEMENT OF THE CASE

This suit was commenced by Appellants in the Chancery Court of Hamilton County, Tennessee on February 26, 1973, against Appellees. (Tr. Vol. 1, pp. 6-25)

This action was one brought to determine whether certain areas had been annexed by the City of Chattanooga and to determine whether the residents of said areas were subject to taxation by the City. The complaint prayed for a declaration that the areas in question, commonly known as Lake Hills-Murray Hills, Tyner and East Brainerd had not been lawfully annexed to the City of Chattanooga and were not in fact within the boundaries of the City.

On November 12, 1968, the City of Chattanooga adopted a plan of services for annexation of the three areas here involved as required by T.C.A. § 6-309 and submitted same to the planning commission which gave its approval. This plan of services consisted of five and a half pages of detailed and specific plans for police protection; fire protection; water for domestic, commercial and industrial use; the installation of fire hydrants; installation of sewers and a complete sewer system and refuge collection; the main-

tenance of streets in the area; the governing of schools in the area; inspection services, etc. Following the approval of the plan of services by the planning commission, the City on November 26, 1968 adopted annexation ordinances of the areas in question pursuant to the provisions of the Public Acts of 1955 which authorized annexation by ordinance. These ordinances are exhibits to the complaint. (Tr. Vol. 1, Ex. 1, 2 and 3). These ordinances were immediately met in December 1968 with *quo warranto* suits filed by aggrieved property owners in the areas to be annexed pursuant to the provisions of T.C.A. § 6-310. These suits were allowed to lie dormant from December 1968 until August 1971, a period of almost three years duration.

The City of Chattanooga admitted that it procured the enactment of Chapter 420 of the Public Acts of 1971 which amended T.C.A. § 6-309, permitting the City of Chattanooga alone to annex by ordinance contiguous territories without levying any muncipal *ad valorum* taxes except for actual services rendered. This has been referred to as the "variable tax plan". Following the adoption of Chapter 420 of the 1971 Public Acts, the Board of Commissioners of the City of Chattanooga voted three to two to enter into compromise decrees of the pending *quo warranto* actions whereby the City would abandon its previously adopted plan of services and proceed to annex the areas in question under the new 1971 act and would impose taxes only for the services rendered. (Tr. Vol. 2, p. 15). Having reached the agreement with the attorneys for the complainants in the *quo warranto* actions, so-called "final orders" were entered in each of the *quo warranto* actions in the Circuit Court of Hamilton County. (Tr. Vol. 1, Ex. 4, 5 and 6). These orders stated in part as follows:

> ". . . by agreement and stipulation of the parties and with the Court's approval, said annexation shall be

implemented as an annexation in accordance with said statutes as amended by Chapter 420 of the Public Acts of 1971."

These final orders contained a new abbreviated plan of services which consisted of slightly more than one-half page and a new timetable for putting these services into effect. They also provided "that under no circumstances shall any tax be levied for any service prior to the year hereinabove specified therefor." These final orders also provided that for the reasons stated in the Preamble of Chapter 420 of the Pulic Act of 1971, which are made a part hereof by reference, the City of Chattanooga shall levy separate *ad valorum* taxes for each municipal purpose and/or service within the existing limits of the City, and shall levy only such taxes, if any, in any territory annexed hereunder when and if the municipal services and/or purpose for which said taxes have been imposed is actually being rendered. These orders then provided that in the event Chapter 420 of the 1971 Public Acts should ever finally be held unconstitutional or for any other reason it is inapplicable, then the annexation would be governed and effectuated under statutes in effect at the time the particular ordinances were passed, but in no event would the relators or those annexed be liable for any taxes which would otherwise have accrued prior to such final adjudication. The orders then concluded with a statement that the actions were dismissed with prejudice effective as of December 1, 1971. The City of Chattanooga then proceeded to annex these areas pursuant to said "final orders" and the three to two vote approving same hereinabove mentioned, until Chapter 420 of the Public Acts of 1971 was held to be unconstitutional by this Honorable Court in the case of *Frost* v. *City of Chattanooga,* 488 S.W. 2d 370.

After this Honorable Court ruled the variable tax statute unconstitutional, this particular action was filed alleging that the areas in question had never been annexed, that the City's efforts were void *ab initio* and accomplished nothing legally; that no ordinances were ever adopted to carry out said annexation and that the City of Chattanooga could not rely upon the original ordinances passed in 1968 under the 1955 act for the reason that the same had been abandoned or "cast aside" by the City. Appellants further asserted that annexation of the areas in question was attempted by judicial legislation which rendered the efforts void and that the Circuit Court had no authority to compromise and settle the *quo warranto* suits without regard to the merits of the issues before the Court. Appellants requested that the 1972 property taxes assessed against them under the unconstitutional act be refunded.

The Honorable Chancellor held that the ordinances enacted in 1968 were clearly abandoned in 1971 when the City Commissioners voted to adopt a new plan of services, a new timetable and a new method of annexation and embody these provisions in "final orders" entered in the Circuit Court *quo warranto* suits. The Chancellor further held that the Complainants in the Circuit Court actions and the Circuit Court itself were without authority to delay the implementation of the 1968 ordinances and plan of services, or to make the same contingent upon the possible determination in the future that Chapter 420 of 1971 Public Acts would be held unconstitutional. The Chancellor held that *quo warranto* actions could not be validly compromised. (Tr. Vol. 1, p. 42).

The Chancellor further held that the property owners in the areas in question are not entitled to have refunded taxes paid in 1972 due to the fact that the property owners of the areas did receive "police protection, street main-

tenance and general services" provided by the City of Chattanooga. (Tr. Vol. 1, pp. 100-101).

The Chancellor, having ruled that the areas in question were not a part of the City of Chattanooga, enjoined the City from exercising any jurisdiction over these areas. Immediately upon the entry of the decree, the City ceased providing any services to the areas in question, said decree being entered on May 11, 1973. (Tr., p. 104).

The case was appealed to the Court of Appeals for the Eastern Section of Tennessee. During the pending of the appeal, the City of Chattanooga filed a motion for extraordinary relief, requesting the Court to allow it to exercise jurisdiction over the areas in question pending the disposition of the matter. This motion was not acted upon until the Court of Appeals rendered its decision on July 24, 1973. Thus, from May 11, 1973 until July 24, 1973, the City exercised no jurisdiction over the areas in question. In fact, from December, 1971 until the present time, the only services rendered by the City of Chattanooga to the areas in question have been inadequate police and fire protection, garbage service, and street maintenance. The schools have been operated by Hamilton County and will continue to be operated by Hamilton County for the next school year.

Although the judgment of the Court of Appeals is not final for purposes of enforcement (T.C.A. § 16-411), nonetheless, the City of Chattanooga is unlawfully exercising jurisdiction over the areas in question. Appellants contend the City is acting in violation of the law and this Court should by appropriate order enjoin the City from exercising jurisdiction over the areas in question until Appellants' Petition for Certiorari is disposed of.

When the City ceased providing services to the areas in question on May 11, 1973, the residents were compelled

to enter into contracts for fire protection and garbage service. The residents have paid money in advance for these services. Now that the City has unlawfully assumed jurisdiction over the areas, the residents are not receiving the private services for which they have already paid. Further, we assume the City intends to tax the residents for fire protection and garbage services pending disposition of this case. Appellants contend that this in essence amounts to "double taxation," all as a result of the City's unlawfully exercising jurisdiction over these areas.

Further, for the City's benefit and protection, it should not exercise jurisdiction over these areas pending disposition of the case. In the event Appellants are successful in their appeal to this honorable court, we see no way the City could impose any taxes on the residents and/or property owners. The end result is that the City would lose thousands of dollars for services rendered in these areas.

During the time the City exercised no jurisdiction over the areas (from May 11, 1973 to July 24, 1973) the County provided adequate police protection and proper maintenance of streets, etc.

Appellants respectfully urge this Court that a writ of supersedeas or other appropriate orders should issue to enjoin the City from exercising any jurisdiction over these areas until this case is finally disposed of.

Appellants submit that since the judgments of the Chancellor and the Court of Appeals are in direct conflict with each other and the residents in the areas being subjected to paying twice for the same services and considering the matter in its entirety, this is a proper case for a writ of supersedeas to issue. *Ramsey* v. *Mutual Supply Company*, (1968) 427 S.W.2d 211.

The Court of Appeals reversed the Chancellor, holding that the areas in question had been annexed and were a

part of the City of Chattanooga since the passage of the annexation ordinances in 1968. Surely this is error because the *quo warranto* suits prevented the ordinances from becoming operative and these suits were pending until 1971. As a matter of fact, the ordinances NEVER BECAME OPERATIVE because the Court never held them to be valid.

The action of the Court of Appeals was harmful and prejudicial to the Appellants and was erroneous for the following reasons:

1. The Court of Appeals reversed the Chancellor's Decree and stated as a reason for doing so that the Chancellor held the 1968 ordinances invalid. The Chancellor made no such holding. He never ruled on the validity of the ordinances.

2. The Court of Appeals *assumed* that the areas had been validly annexed and then said that one of the basic and underlying questions is whether the City can contract its boundaries otherwise than under T.C.A. § 6-304. The assumption is in error. The fact assumed constitutes an issue in the case, consequently, no decision was rendered on the issue. Contraction of boundaries is not an issue in the case.

3. The Court of Appeals failed to find that the City had abandoned the 1968 ordinances despite testimony of one of the Defendants (Appellees) to the contrary.

4. The Court of Appeals placed an erroneous interpretation on T.C.A. § 6-313 and failed to find that the 1968 ordinances had been abandoned.

5. The Court of Appeals construed the issue as one of "de-annexation"; whereas, there was no such issue.

The Chancellor as well as Appellants and Appellees all agree that the Court has no power to "de-annex". The question was whether the areas had even been annexed; that is, whether the annexation attempts were void *ab initio.*

6. The Court of Appeals said that Appellants "conceded" the validity of the 1968 ordinances whereas this is contrary to fact. Appellants unconditionally deny their validity.

7. The Court of Appeals ignored the effect of a resolution or action adopted by Appellees abandoning the 1968 ordinances on the erroneous assumption that Appellants conceded the validity of said ordinances as stated in paragraph 6 above.

8. The Court of Appeals treated "de-annexation" as a basic and underlying question, whereas it is not an issue in the case.

9. The Court of Appeals erred in denying Appellants recovery of 1972 taxes.

10. The Court of Appeals sustained all of Appellees' Assignments of errors to the Chancellor's decree, but no reference was made to any specific assignment nor was any finding made with respect thereto.

In an accompanying brief and assignments of errors the Appellants specifically assign errors upon the disposition of the case by the Court of Appeals in these regards and pray that said assignments of errors and brief be treated as a part of this petition.

Appellants have fully complied with the rules of this Court in connection with the Petition for Writs of Certiorari and Supersedeas and have rendered the required

five (5) days notice to Appellees, a copy of same being attached to this petition.

Premises Considered, Appellants pray:

(1) That a writ of certiorari, for which this is the first application, issue from this Honorable Court to the Honorable Court of Appeals, directing said Court, and the Clerk thereof, to certify, and transmit to this Court the entire record and proceedings in this case, including the opinion and the judgment of the Court of Appeals.

(2) That this case be placed upon the docket of this Court for argument and that the judgment of the Court of Appeals, reversing the judgment of the Chancery Court of Hamilton County, be reviewed and reversed, and the errors complained of corrected.

(3) That in aid of the certiorari, a writ of supersedeas, for which this is the first application, issue from this Honorable Court to supersede and stay execution of the judgment of the Court of Appeals, pending the final determination of this case in this Court and that Appellee, City of Chattanooga, Tennessee, be specifically enjoined from exercising any jurisdiction over the areas in question pending final disposition of the case.

(4) That in the alternative, the Court issue a stay order to preserve the "status quo" of the areas in question and enjoin the City from exercising any jurisdiction over said areas.

(5) That Appellants have all such other, further and general relief, to which they may be entitled.

THIS IS THE FIRST APPLICATION FOR THE WRITS OF CERTIORARI AND SUPERSEDEAS IN THIS CASE.

TANNER & JAHN, ATTORNEYS
By /s/ LEONARD R. TANNER, JR.
/s/ STAN GUTHRIE

Attorneys for Appellants,
James D. Lee, et al.

STATE OF TENNESSEE)
COUNTY OF HAMILTON)

I, STAN GUTHRIE, being duly sworn, make oath that I am one of the Attorneys for Appellants, James D. Lee, et al; that I am familiar with the facts made on the foregoing petition; that same are true, except those stated on information and belief and those I believe to be true; and further, that in my opinion the Appellants are entitled to the relief prayed.

/s/ STAN GUTHRIE

Sworn to and subscribed before me
this 18th day of August, 1973.

/s/ SARAH DIXON
Notary Public
My commission expires: 4-4-76

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX
III

IN THE SUPREME COURT OF TENNESSEE

COURT OF APPEALS EASTERN SECTION

No. 248

JAMES D. LEE, ET AL,
Petitioners,

vs.

THE CITY OF CHATTANOOGA, ET AL,
Respondents.

PETITION OF JAMES D. LEE, ET AL, FOR A REHEARING

Submitted by:

TANNER & JAHN, Attorneys
12 Floor – Volunteer Building
Chattanooga, Tennessee 37402
Attorneys for Petitioners
James D. Lee, et al

THE PETITION OF JAMES D. LEE, ET AL FOR A REHEARING

TO THE HONORABLE SUPREME COURT OF THE STATE OF TENNESSEE:

Petitioners, James D. Lee, et al, the original Plaintiffs in this cause, respectfully show to the Court:

The they are much aggrieved by the Court's denial of their Petition for Writs of Certiorari and Supersedeas on November 5, 1973.

Petitioners are particularly aggrieved because of the following errors of fact and law arising out of the opinion rendered by the Court of Appeals for the Eastern Section of the State of Tennessee:

I. THE OPINION OF THE COURT OF APPEALS DOES NOT MEET THE ISSUE AND CANNOT BE RECONCILED WITH THE FACTS IN THE RECORD.

II. THE OPINION OF THE COURT OF APPEALS DOES NOT MEET THE ISSUES RAISED BY THE CHANCELLOR.

III. THE COURT OF APPEALS SUSTAINED THE RESPONDENTS' ASSIGNMENTS OF ERRORS WITHOUT MAKING ANY FINDINGS TO SUPPORT SAID DECISION.

IV. THE COURT OF APPEALS HELD THAT THE 1968 ORDINANCES WERE AND HAD BEEN VALID SINCE THEY WERE PASSED ON NOVEMBER 26, 1968; WHEREAS, THIS WAS NEVER AN ISSUE BEFORE THE CHANCELLOR AND THERE IS NOT ONE IOTA OF PROOF OR A SCINTILLA OF EVIDENCE IN THE RECORD THAT CONDUCES TO PROVE OR DISPROVE THE ISSUE OF VALIDITY OF THE 1968 ORDINANCES. THIS ISSUE WAS

BEFORE THE CIRCUIT COURT IN THE QUO WARRANTO SUITS BUT NOT THE CHANCERY COURT IN THIS SUIT. NO EVIDENCE ON THIS ISSUE WAS EVER INTRODUCED IN THE CIRCUIT COURT QUO WARRANTO SUITS AND THE COURT MADE NO FINDINGS ON THE ISSUE.

V. PETITIONERS HAVE BEEN DENIED DUE PROCESS OF LAW IN THAT ANNEXATION OCCURRED BY JUDICIAL LEGISLATION – NOT BY LEGISLATIVE PROCESS AS REQUIRED BY TENNESSEE STATUTES, T.C.A. § 6-303, ET SEQ.

VI. THE COURT FAILED TO CONSIDER THAT THE 1968 ORDINANCES AND PLAN OF SERVICES REQUIRED BY T.C.A. § 6-309 HAD BEEN ABANDONED AND AN ENTIRELY NEW AND DIFFERENT METHOD OF ANNEXATION HAD BEEN ADOPTED PURSUANT TO A CIRCUIT COURT DECREE WHICH WAS NULL AND VOID.

PETITIONERS PRAY:

1. That a rehearing be granted, and that this Court grant certiorari and correct the manifest errors contained in the opinion and judgment of the Court of Appeals.

2. That Petitioners have such further and other relief to which they may be entitled.

TANNER & JAHN
12th Floor – Volunteer Building
Chattanooga, Tennessee 37402

By: /s/ STAN GUTHRIE
/s/ LEONARD R. TANNER, JR.
Attorneys for Petitioners

[CERTIFICATE OF SERVICE OMITTED]

APPENDIX

IV

IN THE SUPREME COURT OF TENNESSEE

COURT OF APPEALS EASTERN SECTION
No. 248

JAMES D. LEE, ET AL,
Petitioners,

vs.

THE CITY OF CHATTANOOGA, ET AL,
Respondents.

SECOND PETITION OF JAMES D. LEE, ET AL FOR A REHEARING OF DENIAL OF PETITION FOR CERTIORARI

Submitted by:

TANNER & JAHN, Attorneys
12th Floor – Volunteer Building
Chattanooga, Tennessee 37402

Attorneys for Petitioners
James D. Lee, et al

SECOND PETITION OF JAMES D. LEE, ET AL FOR A REHEARING OF DENIAL OF PETITION FOR CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE STATE OF TENNESSEE:

Petitioners, James D. Lee, et al, the original Plaintiffs in this cause, respectively show to the Court:

They are much aggrieved by the Court's denial, on November 5, 1973, of their Petition for writs of Certiorari and Superseadeas, and the Court's denial of their Petition for a Rehearing on January 7, 1974.

In accordance with Rule 32 of this Court, Petitioners made application and obtained special leave from Justice Chester Chattin by order dated January 17, 1974, allowing them until January 31, 1974 within which to file this Second Petition for a Rehearing.

Petitioners are particularly aggrieved because of errors of fact and law arising out of the opinion of the Court of Appeals for the Eastern Section of the State of Tennessee, and particularly on the following grounds:

I. PETITIONERS' CONSTITUTIONAL RIGHTS HAVE BEEN VIOLATED AND THE COURT OF APPEALS FAILED TO EVEN REFER TO THE PROBLEM.

The Trial Court held that the attempted annexation was void because Judicial Legislation was substituted for the enactment of annexation ordinances as required by T.C.A. § 6-303, et seq. The attempt was void as constituting a violation of the doctrine of separation of powers and a denial of due process and equal protection of the laws under both the Constitutions of the United States and the State of Tennessee.

The Court of Appeals, in its opinion, did not mention the Trial Court's holding that "Judicial Legislation" was involved. The constitutional question was ignored. The

Court assumed facts contrary to the record and arrived at conclusions based upon these erroneous assumptions without even mentioning the pivotal constitutional issue.

The Supreme Court, by its denial of the Petition for Writ of Certiorari, likewise has not expressed its opinion on the constitutional issue.

Under the circumstances, we face a situation where the Chancery Court of Hamilton County has held that actions of the City of Chattanooga and the Hamilton County Circuit Court were in violation of the constitutional rights of some 20,000 Tennessee citizens; and on appeal by the City, the Chancellor has been reversed but our Court of Appeals has failed and our Supreme Court has declined to express an opinion on the constitutional question. This is difficult for the residents to understand.

The provisions of the United States and Tennessee Constitutions forbidding legislation by the Judicial Department are Section 1 of Article I of the United States Constitution which provides:

> "*Legislative powers vested in congress.* — All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives."

and Sections 1 and 2 of Article II of the Constitution of Tennessee which provide:

> "Sec. 1. *Division of powers.* — The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial."
>
> "Sec. 2. *Limitation of powers.* — No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted."

"Separation of powers" is a fundamental concept in our constitutional form of government. From the time of the establishment of the Constitution it has been recognized that one of the three departments of the government will not be allowed to encroach upon either of the others. The Judicial Branch will not be allowed to encroach upon the Legislative Branch. Legislation attempted by the Courts is in violation of the doctrine of separation of powers; therefore, unconstitutional and void.

Judicial Legislation is the unconstitutional process whereby annexation was attempted in this case. This occurred in 1971 when the City "cast aside" or abandoned its 1968 annexation ordinances, (as City Commissioner Conrad testified and no one testified to the contrary) and substituted Consent Decrees for new Annexation Ordinances. The Decrees contained the provisions one would normally expect to find in duly enacted ordinances; however, the legislative process was not followed and the legal and constitutional effect upon the residents was the difference between night and day. The Decrees substituted for new Annexation Ordinances were entirely different from the old 1968 Ordinances. They included a new plan of services, a new timetable for putting these services into effect and a new method of taxation (which this Court called a new method of annexation in *Frost et al* v. *City of Chattanooga*, 488 S.W. 2d 370). The Consent Decrees were authorized and approved as a substitute for new ordinances by all five City Commissioners by a 3-2 vote at a meeting attended by all of the Commissioners and the City Attorney. The established procedures for enacting an ordinance were not followed. Ordinances were contemplated but not passed. They were not passed because it was apparent to the Commissioners that if ordinances had been enacted as required by T.C.A. § 6-303 et seq., appropriate

notices would have been given, hearings conducted and the residents would have had the opportunity to assert their statutory right under T.C.A. § 6-309 to question the reasonableness of the ordinance by *quo warranto* suits. The Consent Decrees denied to all 20,000 residents other than the few who were parties to the suits the opportunity to assert their statutory rights. This was a denial both of due process and of equal protection of the laws — clearly unconstitutional.

The enactment of new ordinances would undoubtedly have opened the door to a flood of new *quo warranto* suits to test the reasonableness of the ordinances. This, the City did not want. Apparently it recognized that the Tennessee statutes required an ordinance to annex, therefore the question was "How could annexation be clothed with legality without ordinances"? Ingeniously, the idea was conceived to make the new substitute annexation plan a part of Consent Decrees in the *quo warranto* suits that had been pending for almost three years and thereby prevent the residents from testing the new plan by *quo warranto* and put the entire matter to rest. Consent Decrees were entered and the cases were dismissed. The Court never heard evidence or made a finding with respect to the reasonableness of the ordinances — either those passed in 1968 or the new plan or method of annexation adopted in 1971. Under these circumstances, the 1968 ordinances never became operative and no other ordinances were passed. Annexation was attempted by Judicial Legislation to avoid the effect of the required legislation — ordinances.

The Chancellor recognized the unconstitutionality of the City's maneuver as judicial legislation.

Respectfully, we submit, on behalf of our clients and their fellow residents, our Tennessee Appellate Courts should not simply ignore this constitutional problem. The

Court of Appeals has failed to even acknowledge the existence of it. Our Supreme Court should meet the problem and resolve it. Tennessee residents should not be required to appeal to the United States Supreme Court to protect their constitutional rights and obtain a review of the decision of one of our Chancellors on a constitutional issue. The Chancellor wrote a learned opinion and dealt in depth with certain basic concepts in our constitutional law.

We urge, as strongly as we know how, that in our humble opinion, the Plaintiffs and the Chancellor deserve the consideration of this Court. As members of the Bar, we are proud of our Highest Court and it enjoys our highest respect. By the same token, we believe that the Plaintiffs' constitutional rights should also be respected — at least, our Appellate Courts should meet and resolve constitutional issues with the expression of an opinion.

II. THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THE FACTS IN THE RECORD.

On July 26, 1973, the Court of Appeals entered an order reciting:

> "And it further appearing that there is manifest error in the decree of the Chancellor holding void and unenforceable the three annexation ordinances described in the pleadings and referred to in the opinion it is further ordered, adjudged and decreed that said ordinances are valid and that said territories are and have been since the enactment of said ordinances a part of the City of Chattanooga."

Respectfully, we submit that the Chancellor did not hold the three annexation ordinances void and unenforce-

able. No proof was introduced at the trial as to their validity or whether they were enforceable. This issue was not argued before the Chancellor.

The reversal of the Chancellor on a holding he did not make creates a confusing situation.

Further, the recital that the territories have been a part of the City since the enactment of the ordinances (in 1968) is contrary to fact. The filing of the *quo warranto* suits in 1968 prevented the ordinances from becoming operative and before the *quo warranto* suits were dismissed on August 18, 1971, there is no question but that the territories were not part of the City. This likewise creates a confusing situation and this Court should clarify.

III. GROUNDS AS SET FORTH IN OUR ORIGINAL PETITION FOR REHEARING ARE HEREBY INCORPORATED HEREIN BY REFERENCE.

PETITIONERS PRAY:

1. That a rehearing be granted, and that this Court grant certiorari and correct the manifest errors contained in the opinion and judgment of the Court of Appeals.

2. That Petitioners have such further and other relief to which they may be entitled.

TANNER & JAHN
12th Floor — Volunteer Building
Chattanooga, Tennessee 37402

By /s/ STAN GUTHRIE
/s/ LEONARD R. TANNER, JR.
Attorneys for Petitioners